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No. 89-859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STEVEN MEDVIK,
Petitioner,

vs.

FRANK OLLENDORFF, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

Respondents Frank Ollendorff, the City of University City, and the Civil Service Board of University City respectfully request that this Court deny the petition for writ of certiorari seeking review of the Opinion of the Missouri Court of Appeals. That Opinion is reported at 772 S.W. 2d 696 (1989).

STATEMENT OF THE CASE

The City of University City discharged petitioner from his job as a mechanic, because petitioner repeatedly called a fellow employee a "nigger." This was the fourth occasion in five years on which petitioner had been disciplined — two of which involved racial slurs. Petitioner was involved in two additional incidents with racial overtones. Petitioner now claims that the discharge violated his rights under the First Amendment.

In May 1980, petitioner received a three day suspension for starting a fight with a fellow employee. App. A, p. A-2. The City also informed petitioner that his critical attitude toward other employees must improve. App. A, p. A-2.

In January 1981, petitioner referred to a black fellow employee as "that damned Frank Jones." App. A, p. A-3. Petitioner then exposed his buttocks to Mr. Jones and laughed. App. A, p. A-3. In February 1981, petitioner referred to Mr. Jones as a "fucking punk," and derided his ability to operate a City vehicle. App. A, p. A-3.

In February 1983, petitioner received a one day suspension for violation of work rules. The City informed him that his prior history was a matter of concern, and that his conduct was not acceptable for a person in a supervisory capacity. The City also told petitioner that further incidents would lead to discipline, including a possible discharge. App. A, p. A-3.

In June 1983, petitioner asked a black fellow employee if he had obtained his ignorance from his mother or father. The City demoted him from supervisor to mechanic, and told him that any further incident would jeopardize his employment status. App. A, p. A-2.

In March 1985, petitioner told his supervisor that Thirplis Williams, a fellow employee, was a "hero nigger," who was misusing the shop. App. A, p. A-2. Petitioner told the supervisor repeatedly that "A nigger was a nigger." App. A, p. A-2. Petitioner told Mr. Williams that "You don't have anything to say to me ever again nigger." App. A, p. A-2.

Rule 20 of the City's work rules permits discipline for:

> An incident involving an unwanted or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature."

App. B, p. B-5. The court below held that, sensibly construed, Rule 20 was intended to "prohibit well known pejoratives unacceptable in the work place." 772 S.W. 2d at 701.

Respondent Frank Ollendorff, the City Manager, reviewed the complete factual record. App. A, p. A-1. Based on that history, he concluded that petitioner's:

> long-term conduct has been inconsistent with a business-like work environment. His background of disciplinary actions, warnings, suspensions and threats of discharge reinforce the conclusion that he has been a troublesome employee over the long term whose retention in the work force will continue to be disruptive to discipline and morale.

App. A, p. A-4.

Petitioner does not challenge the factual basis for his dismissal. Instead, he claims that Rule 20 violates his alleged rights under the First Amendment to engage in racial harassment of fellow employees.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE FIRST AMENDMENT DOES NOT PROTECT A PUBLIC EMPLOYEE'S PRIVATE RACIAL SLURS.

This Petition asserts that the First Amendment protects a public employee's "right" to call a fellow employee a nigger. The premise is that the First Amendment applies to public employee discipline in the same way that it applies to criminal statutes enacted pursuant to a state's police power. The premise is false.

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court so held. When acting as an employer, a public entity may regulate the private speech of its employees to assure the efficient conduct of its operations:

> [I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
>
> . . . .
>
> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 146-47. Accord, *Rankin v. McPherson*, 483 U.S. 378, 384 *reh. denied*, 483 U.S. 1056 (1987) (public entity may

discipline employees for speech that interferes with efficient operations).

There is no rational argument — and petitioner certainly makes none — that his remarks dealt with matters of public concern. There is no social utility in repeatedly calling a black man a "nigger." On the contrary, as the Court below found, it is hard to imagine an insult more likely to disrupt the work place. 772 S.W. 2d at 702. Indeed, the City might have exposed itself to serious legal liability had it *not* prohibited this type of "free speech." *Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363, 105 L. Ed. 2d 132, 152-53 (1989).

The court below understood and followed this Court's precedents. The court below recognized the difference between criminal statutes and administrative rules governing public employees. 772 S.W. 2d at 702, *quoting Rankin*. It clearly understood the distinction between matters of public and private concern. *Id., citing Connick*. And it expressly found that the City's interest in efficient operations outweighed whatever rights petitioner may have had. *Id., citing Pickering v. Board of Education*, 391 U.S. 563 (1968). Petitioner's claim that this carefully reasoned decision ignored this Court's First Amendment jurisprudence is simply wrong.

The First Amendment does not protect the type of conduct in which Petitioner engaged. He has no right to vent his racial animus upon a fellow employee.

II. AS CONSTRUED BY THE MISSOURI COURTS, RULE 20 IS A NARROW AND SPECIFIC LIMITATION UPON CONDUCT NOT PROTECTED BY THE FIRST AMENDMENT.

Even if the First Amendment protected petitioner's wholly private remarks, Rule 20 passes constitutional muster. The court below interpreted Rule 20 to mean something quite different than petitioner's fevered speculation. So construed, Rule

20 easily satisfies the "fighting words" test set forth in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

The court below directly addressed petitioner's argument that Rule 20 was facially unconstitutional. It rejected that argument, because the Rule was susceptible to a "sensible construction" that did not violate the First Amendment. 772 S.W. 2d at 701-02. Petitioner now claims that the court below violated *Missouri* law in so construing the Rule. Pet. at 14-16. Of course, state court interpretations of state law are binding upon this Court. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 162-63 (1971).

As construed by Missouri courts, therefore, Rule 20 prohibits "well known pejoratives unacceptable in the workplace." Under *Chaplinsky*, that Rule complies with the First Amendment. In *Chaplinsky*, the statute prohibited "offensive" words. The state court construed that term to mean words that:

> men of common intelligence would understand would be words likely to cause an average addressee to fight.

315 U.S. at 573. This Court held that such a statute was "narrowly drawn" — limited to "specific conduct" that was likely to cause a breach of the peace. *Id.* at 573-74.

The same rule applies here. As the court below noted:

> A rule designed to prevent inflammatory and disruptive statements, however, necessarily involves some inherent uncertainty. Other than a litany of selected terms, an alternative definition that provides a bright line between permissible and impermissible speech in the work place is not readily apparent. . . . At this stage of civilized history, persons of normal intelligence are capable of determining whether a racial remark is "unwarranted" or "imprudent."

772 S.W. 2d at 701.

Mr. Chaplinsky could determine that describing people as a "god damned racketeer" and a "damned Fascist" was likely to provoke a breach of the peace. Especially in light of repeated prior warnings, petitioner could deduce that calling a fellow employee a nigger is conduct "unacceptable in the work place."

As construed by the court below, Rule 20 satisfies any First Amendment concerns that may apply.

III. RULE 20 IS NOT VOID FOR VAGUENESS.

Petitioner also asserts that Rule 20 is void for vagueness, on the theory that a mechanic with an eighth grade education could not know that such remarks were prohibited. Pet. at 18-19. This contention is frivolous.

Petitioner acknowledges that the City could prohibit his racial slurs without violating the First Amendment. Pet. at 13. Moreover, petitioner had clearly been told that further racial harassment would lead to discipline, including discharge. App. A, p. A-2. Thus, petitioner had ample notice that such misconduct could forfeit his job. Outside the context of the First Amendment, a vagueness objection "may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 100 L. Ed. 2d 372, 380 (1988).

To the extent that petitioner's vagueness argument relies on the First Amendment, of course, Points I and II of this Reply adequately address the issue.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that this Court deny the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

CITY OF UNIVERSITY CITY

In the Matter of:
Appeal of Stephen Medvik

CITY MANAGER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

I have read the transcript of the proceedings before the Civil Service Board of University City on the appeal of Stephen Medvik from his discharge from City employment as a mechanic, as well as the exhibits which were introduced at the hearing. I have also reviewed the findings and recommendation of the Civil Service Board.

After this case was remanded by the Court, I sent a letter to Mr. Medvik and his attorney, Alan G. Kimbrell, affording them the opportunity to present oral argument or a written brief to me. A copy of this letter is attached. In response, Mr. Kimbrell submitted the written brief which had been filed in the Court of Appeals on behalf of Mr. Medvik. Mr. Kimbrell further stated that Mr. Medvik waived the right to present oral argument. A copy of Mr. Kimbrell's response is attached. I have read Mr. Kimbrell's brief.

Taking into consideration the matter presented at the hearing, including both the testimony and the documents, the findings and recommendation of the Civil Service Board, and the appellate brief submitted on behalf of Mr. Medvik, I sustain his discharge, and make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On March 15, 1985, Medvik's fellow employee, Thirplis Williams, approached Medvik about a matter Williams had

reported to his supervisor concerning Medvik and a statement made by Medvik about Williams. Medvik told the supervisor, "Your hero nigger is misusing the shop." When Williams sought to talk to Medvik, Medvik replied, "You don't have anything to say to me ever again nigger." On the day before, Medvik had told the supervisor repeatedly that "A nigger was a nigger."

2. On June 17, 1983, Medvik was demoted from the position of Supervising Mechanic to Mechanic, with a one-step decrease in pay and a change in shift because he had made the following remark to a black employee — "Where did you get your ignorance from — your mother or your father?" Medvik was informed in writing that the remarks were completely out of line and particularly out of character for a supervisor. He was also notified that if any further incidents occurred, his employment status would be reviewed and discharge may result.

3. On February 28, 1983, Medvik was given a one-day suspension for violations of procedures and work rules on February 9, 1983. He was admonished that he had been involved in several incidents for which he had received either warning letters or suspensions, and that the frequency of such events was a matter of concern; that they were not in character with the conduct expected not only of a City employee, but, more significantly, that which is demanded of a supervisor. He was informed that should any more incidents occur, his supervisory status would be reviewed and demotion and/or suspension would be forthcoming, if not discharge.

4. On May 2, 1980, Medvik was suspended for three working days without pay. This action was taken because of Medvik's having started a fight with another employee, resulting in the breaking of the other employee's glasses. Medvik was told that his critical attitude toward other employees must improve immediately.

5. On February 10, 1981, a black employee, Frank Jones, had been asked to drive a payloader during the night. When

Medvik was informed that Jones was going to drive the vehicle, he said, "You mean to tell me Frank is going to drive that?" When Jones stated that he was qualified to drive it, Medvik responded: "Don't say a f-----g thing to me, Frank." After Jones asked what he meant, Medvik called Jones all kinds of f-----g punks, using all sorts of obscenities.

6. On January 27, 1981, Medvik stated, upon seeing Willie Jones, a black employee, entering the garage, "Here comes that damned Frank Jones." Medvik dropped his pants on the garage floor, then bent over and parted his buttocks, exposing himself to Jones. Then Medvik arose and pulled his pants back up and made a big laugh out of it.

7. Medvik was discharged by his department head, Willie Norfleet, Director of Finance, as of the end of the work day on March 22, 1985.

CONCLUSIONS OF LAW

1. By administrative regulation promulgated several years ago, the City compiled existing practices relating to discipline of City employees for violation of work rules. Violations were categorized into several groups and uniform disciplinary penalties were recommended. These were incorporated into the Employees Handbook.

2. Application of the suggested disciplinary penalties to Mr. Medvik's case warrants his discharge. For a fourth offense under Group I, the discipline is discharge. Medvik's record establishes at least four offenses under Group I. The racial slur made by him on March 15, 1985, concerning Thirplis Williams, was an incident involving an imprudent statement to a co-worker of a racial nature and fell within Group I, Item 20. Prior to this offense, the record established that Medvik had been disciplined for earlier Group I offenses — demotion, decrease in pay and shift change on June 17, 1983 for making an imprudent statement to a black employee; a one-day suspension for viola-

tion of several procedures and work rules on February 9, 1983; a three-day suspension for starting a fight with a fellow employee on April 14, 1980. Although unnecessary to my determination, the incidents of February 10, 1981 and January 27, 1981 also constitute improper conduct with racial overtones.

3. By its terms, the addition to the Employees Handbook setting out the recommended uniform disciplinary penalties is intended to serve as a guide to department heads for disciplining employees. It explicitly provides that its rules and regulations are not to be construed as a limitation upon the retained rights of the City, which include the discretion not only to suspend the operation of disciplinary action, but also to issue a more severe penalty than set out in the standard procedure, if it is felt necessary. The announced rules and regulations are working tools to be applied with sound discretion in the interest of discipline and morale in the work place.

4. An evaluation of Mr. Medvik's employment record compels the conclusion that his long-term conduct has been inconsistent with a business-like work environment. His background of disciplinary actions, warnings, suspensions and threats of discharge reinforce the conclusion that he has been a troublesome employee over the long term whose retention in the work force will continue to be disruptive to discipline and morale.

5. The action of the Director of Finance is sustained and Mr. Medvik is discharged, effective March 22, 1985.

/s/ Frank Ollendorff,
City Manager

Dated: August 27, 1987

APPENDIX B

Addition to

EMPLOYEES HANDBOOK

City of University City, Missouri

As a new City employee, you should be familiar with the following Administrative Regulation, which became effective March 16, 1981. The formulation of this regulation is for the benefit of the employee so that uniformity and fairness could be achieved and this was done through a compilation of many existing practices.

Uniform Disciplinary Penalties Recommended to City Departments for the Enforcement of General Work Rules

The following is intended to serve as a guide to department heads for providing some uniform procedures and penalties for disciplining or terminating **Regular Full-time Employees** for certain violations of general work rules. Seasonal, temporary, or probationary employees may be disciplined or terminated without recourse to such disciplinary procedures.

This regulation is not intended to contradict any provision contained in the other Specific Department Work Rule or Rules or the Police or Fire Manuals which may be more restrictive due to the unique character of that departmental operation and the expectations of employees within that department. Department heads must also follow the procedures contained in the Civil Service Rules governing Penalties and Separations for the executions required in the enforcement of such penalties.

WORK RULES

All employees of the City of University City are considered members of a team working together for the main purpose of serving our community. Employees who fail to follow the necessary rules and regulations governing their conduct not only hurt themselves, but reflect an undesirable image on the other City employees. In such cases, the supervisor is expected to take action to insure that the efforts of the majority of the employees are not jeopardized. This is done by applying the City's Rules and Regulations for employees.

In recognition of the fact that each instance differs in many respects from somewhat similar situations, the City retains the right to treat each occurrence upon its individual merits and without creating precedents for the treatment of any other case which may arise in the future. The City retains the right to suspend the operation of any disciplinary action which it may take, during good behavior for a specified term, at its exclusive discretion. Examples given in any rule do not limit the generality of the rule. Also, several infractions are of a related type offense dealing with poor work habits or disregard for established work schedules. In these cases of combined related infractions, consideration may also be given to deviation from the prescribed penalty. These rules and regulations are not to be construed as a limitation upon the retained rights of the City, but are merely a guide.

This Section of the rules and regulations applies for specific offenses. This means that a more severe penalty may be issued than that prescribed in the standard procedure, if it is felt necessary.

GROUP 1

First Offense Warning followed by appropriate instruction
Second Offense . . . One or two-day suspension without pay
Third Offense . . . . . Five-day suspension, without pay
Fourth Offense . . . . . Discharge

NOTE: Consideration may be given to the severity of the offense, the cost involved, the time interval between offenses, the length and quality of service record, and the ability of the employee concerned. In each case where the penalty deviates from the recommended standard penalties, the reasons for such deviation will be noted.

1. Absence from duty, without prior permission from the supervisor, except for cause beyond the control of the employee which prevents obtaining prior approval. When advance notice cannot be given, employees are expected to notify their supervisor, or if this is not possible, the supervisor designee (prior to shift start), of the reasons for their absence and the expected time of their return. Such notification does not mean that approval or permission has been granted for the absence. More restrictive time variables may be imposed by individual departmental regulations.

2. Leaving the assigned working area at any time without permission from the supervisor.

3. Neglect or carelessness in observance of official safety or departmental rules, or disregard of common safety practices.

4. Malicious mischief, horseplay, wrestling or similar undesirable conduct.

5. Disregarding job duties by neglect of work or reading for pleasure during working hours.

6. Tardiness.

7. Failure to commence work at the beginning of the duty period and leaving work prior to the end of the duty period. All employees are expected to work, excluding authorized breaks, from the beginning to the end of the duty period and neither arrive late nor leave early.

8. Creating or contributing to unsanitary or unsafe working conditions. Examples are: throwing refuse or objects on the floor or work area or placing or failing to remove hazardous objects from the assigned work area (These examples do not limit the generality of the rule).

9. Use or possession of another employee's working equipment without the supervisor's or employees's consent.

10. Willful failure, neglect or carelessness in punching as assigned time card in or out, if required, or failing to properly complete a required time of production report.

11. Stopping work or making preparations to leave work without specific authorization before the lunch period, or for any authorized break in work, or before the specified quitting time (two examples are: washing up or changing clothes before the specified quitting time).

12. Distracting the attention of others, or causing confusion by unnecessary shouting, catcalls, or demonstrations on the job.

13. Unsatisfactory work and/or failure to maintain required standards of performance.

14. Failure to report any personal injury or equipment damage immediately to the supervisor or failure to complete any required injury or damage forms.

15. Any type of solicitation without official permission during working hours.

16. Gambling, solicitation for bookmaking or similar offenses of a serious nature.

17. The use of any form of drug, including prescription medication, which may affect work, without prior notice to the supervisor.

18. Unauthorized posting of notices, or unauthorized removal of notices or signs from bulletin boards on City property.

19. Distributing or posting written or printed matter of any description on City premises unless authorized to do so by proper authority.

20. An incident involving an unwanted or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature.

GROUP II

First Offense . . . Two-day suspension without pay followed by appropriate instruction

Second Offense . . . . . Discharge

NOTE: Consideration may be given to the severity of the offense, the cost involved, the time interval between violations, the length and quality of service record, and the ability of the employee concerned. In each case where the penalty deviates from the recommended standard penalties, the reasons for such deviation will be noted.

1. Leaving the job during regular working hours without notice to and permission from the supervisor. Where the operations are continuous, an employee shall remain on the job through the end of the scheduled shift, until relieved by the supervisor or the relieving employee of the succeeding shift.

2. Sleeping during working hours.

3. Reporting for work or attempting to work while unfit for duty.

4. Possession of or drinking alcoholic beverages on the job.

5. The use of abusive or threatening language toward subordinates, fellow employees, members of the supervisory force, or the general public during working hours.

6. Failure to report for overtime work without good reason after being scheduled to work according to overtime policy, or refusal to accept emergency overtime work without sufficient reason.

7. Threatening, intimidating, coercing, or interfering with subordinates, fellow employees, or supervisors at any time.

8. Failure to report any accident, vehicular or otherwise, in which the employee was involved.

9. Refusing to give testimony when accidents, vehicular or otherwise, are being investigated by proper authority.

10. Unauthorized use of City property for private purposes or performing private work on City time.

11. The making or publishing of false, vicious or malicious statements concerning any employee, supervisor, city official, the City or its operations.

12. Conduct violating morality or common decency.

13. Sexual, racial, ethnic or religious harassment of a coworker.

14. Sexual, racial, ethnic or religious harassment of a member of the public whose contact with the employee is related to the employee's duties.

GROUP III

First Offense . . Five-day suspension without pay, followed by appropriate instruction

Second Offense . . . . . Discharge

NOTE: Consideration may be given to the severity of the offense, the cost involved, the time interval between violations, the length and quality of service record, and ability of the employee concerned. In each case where the penalty deviates from the recommended standard penalties, the reasons for such deviations will be noted.

1. Wanton or willful neglect in the performance of assigned duties or in the care, use or custody of any City property. Abuse or deliberate destruction in any manner of City property, tools, equipment, or the personal property of employees.

2. Punching another employee's time card, altering another employee's time card, or unauthorized altering of an assigned time card.

3. Insubordination by the refusal to perform work assigned or to comply with written or verbal instructions of the supervisor which the employee may reasonably be expected to perform.

4. Fighting with or attempting injury to another employee.

5. Falsifying testimony when accidents are being investigated or falsifying or assisting in falsifying personnel or other records, including production or work performance reports.

6. Making false claims or misrepresentations in an attempt to obtain unjustified leave benefits.

7. Misuse or removal of confidential City records or information of any nature, or revealing such information without proper written authority from the City.

8. Instigating, leading or participating in any walkout, strike, sitdown, stand-in, slow-down, refusal to return to work at the scheduled time for the scheduled shift, or other concerted curtailment or restriction of production or interference with work in or about the City.

9. Engaging in unlawful or improper conduct off the City premises or during non-working hours which affects or which tends to affect the employee's relationship to the job, fellow employees, supervisors of the City's property, reputation or good will in the community.

10. Representing or implying to a co-worker, subordinate, or member of the public, that the giving of a gift will result in preferential treatment.

11. Knowingly harboring a communicable disease such as, but not limited to, tuberculosis, which may endanger the health of other employees.

12. Stealing.

13. Using illegal drugs of any kind.

14. Dishonesty or any dishonest action.

15. Sexual, racial, ethnic or religious harassment of a subordinate.

GROUP IV

First Offense ..... Discharge

Employees may without prior warnings be subject to dismissal for serious infractions. Activities involving the items or areas listed below should be avoided. Each incident will be reviewed on a case by case basis.

1. Criminal activity.
2. Unauthorized use or display of firearms, explosives or other lethal weapons.
3. Accepting or soliciting a bribe of money, merchandise or personal services.
4. Fraudulent claim for on-the-job injury benefits or for Workers Compensation payments.
5. Removal from job if appointment has been made through fraud or error.
6. Taking part in the political campaign of any candidate for Councilmember or Mayor of the City of University City.
7. Making any contribution, direct or indirect, to any candidate for Councilmember or Mayor of the City of University City.
8. Serious infractions for miscounduct, inefficiency or other just causes not described in prior groupings.

/s/ Frank Ollendorff
City Manager